

UNRESTRICTED - CP

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-217816

DATE: AUGUST 23, 1985

MATTER OF: Carolyn Wertz

DIGEST: Employee of the Veterans Administration who received overpayment of pay due to promotions she received prior to achieving the 1 year in grade minimum requirement requests waiver of her debt. Since the employee had been a payroll clerk, which required knowledge of various pay entitlement laws and regulations, and had been a Government employee for a number of years, she should reasonably have known she was not entitled to promotion after 3 months in grade. Denial of waiver is sustained.

This action is in response to a request for reconsideration of our Claims Group's May 1, 1982 denial of a waiver of overpayments made to Ms. Carolyn Wertz. Ms. Wertz requests waiver of \$1,735.20 in overpayments of pay she received which resulted from two erroneous promotions. The Veterans Administration recommended denial of the waiver since prior to the overpayments Ms. Wertz had occupied a position which required knowledge of various pay entitlement laws and regulations. Our Claims Group denied waiver on this basis. It is our view that the denial of waiver was correct and the overpayments should not be waived.

Background

Ms. Wertz, an employee of the Veterans Administration in Los Angeles, California, had been promoted to a GS-6 position on March 23, 1975, and, therefore, would have achieved the 1-year minimum time in grade for her next promotion on March 28, 1976. However, she was erroneously promoted to the position of fiscal accounts supervisor, GS-7 (step 4), on June 22, 1975. Effective July 4, 1976, Ms. Wertz was promoted to the GS-9 level, although, because of her erroneous promotion to GS-7, she would not have been eligible for this promotion until April 10, 1977.

The error was discovered by the agency, apparently in the course of an investigation of an Equal Employment Opportunity complaint made by another employee. Ms. Wertz was

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B-217816

notified of the error in December of 1979. The erroneous promotions resulted in overpayment of pay to Ms. Wertz of \$1,735.20, for which she requested waiver.^{1/}

One year minimum time in-grade

An appointment to a position in the competitive service must be made in compliance with all applicable service rules and regulations. At the time of the promotions in question, a statutory provision, commonly known as the Whitten Amendment,^{2/} as implemented by regulation found in 5 C.F.R. § 300.601, et seq., required that an employee in grade GS-6 and above serve a minimum of 1 year in grade before promotion. Ms. Wertz' promotions were in violation of this prohibition and resulted in the overpayments to her.

Waiver

The Comptroller General is authorized by 5 U.S.C. § 5584 (1982) to waive claims for erroneous payments of pay and allowances, other than travel and transportation expenses, if collection would be against equity and good conscience and not in the best interest of the United States. However, such authority may not be exercised if there is an indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim. Implementing regulations are found in 4 C.F.R. Part 91 (1984). Conditions for waiver are found in 4 C.F.R. § 91.5.

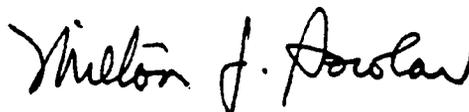
^{1/} Ms. Wertz also now asks whether, in the event that her request for waiver is again denied, it is too late to file a claim for overtime pay for overtime she asserts that she worked during the period involved here. Any such claim she would now file for overtime during the 1975-1977 period would be barred by the statute of limitations as not being received in the General Accounting Office within 6 years of the time the claim accrued. 31 U.S.C. § 3702(b) (1982).

^{2/} Section 1310(c) of Public Law 253, as amended, 65 Stat. 736 (1951) approved, November 1, 1951, 5 U.S.C. § 3101 note (1970).

B-217816

In the case before us, there is no evidence of fraud, misrepresentation, or lack of good faith on the part of the employee; however, it appears that Ms. Wertz is not without fault in the matter. Whether an employee who receives an erroneous payment is free from fault in the matter can only be determined by careful analysis of all pertinent facts, not only those giving rise to the overpayment but those indicating whether the employee reasonably could have been expected to be aware of the error. In determining whether an employee's actions are reasonable with regard to an overpayment we examine such matters as the employee's position, experience, knowledge and service history. See, John R. Hanson, B-189935, November 16, 1978.

In the present case, Ms. Wertz asserts that she was not aware of the 1-year in-grade requirement. However, the agency has pointed out that Ms. Wertz occupied the position of payroll clerk, which required knowledge of various pay entitlement laws and regulations. We also note that Ms. Wertz's service computation date is January 7, 1966, which indicates she had been a Government employee for over nine years at the time of the erroneous promotions. We find that an employee of her experience should have been aware of the Federal pay structure and the fundamental requirements for promotion, at least to the extent that she should have questioned appropriate personnel officials as to her eligibility for promotion less than 3 months after receiving a previous promotion. In addition, the agency has provided informal advice that although the vacancy announcement which would have notified Ms. Wertz of the opening is no longer available, such announcements routinely notify the applicants of the requirement of 1 year in grade prior to promotion. Thus, based on the pertinent facts in the record, it appears that Ms. Wertz cannot be considered without fault in the matter, and the request for waiver was properly denied.



Acting Comptroller General
of the United States